DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California
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BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

HILARIO MIRAVALLES, Petitioner, vs. ARTISTS, INC., Respondent.	Case No. TAC 33-99 DETERMINATION OF CONTROVERSY

INTRODUCTION

The above-captioned petition was filed on September 3, 1999 by HILARIO MIRAVALLES (hereinafter "Petitioner" or "MIRAVALLES"), alleging that ARTISTS, INC., operated by Vice President, Thad Weinlein, (hereinafter "Respondent" or "Weinlein"), acted as an unlicensed talent agency in violation of Labor Code §1700.5[1]. Petitioner seeks a determination from the Labor Commissioner voiding a 1997 written agreement *ab initio,* and seeks disgorgement of all consideration collected by respondent stemming from this agreement.

[1] All statutory citations will refer to the California Labor Code unless otherwise specified.

Respondent was served with a copy of the petition on September 28, 1999. Respondent filed his answer with this agency on October 29, 1999, defending on the position that the respondent did not act an agent, but rather acted as an employer and is therefore not subject to the jurisdiction of the Labor Commissioner. A hearing was scheduled and commenced before the undersigned attorney, specially designated by the Labor Commissioner to hear this matter on March 31, 2000, in Los Angeles, California. Petitioner was present and represented by Stuart Libicki of Schwartz, Steinsapir, Dohrmann & Sommers LLP; Respondent did not appear personally but was represented through his attorney, Alan M. Brunswick of Manatt Phelps Phillips. Post trial briefs were submitted on June 5, 2000.

Due consideration having been given to the testimony, documentary evidence, arguments and briefs presented, the matter was taken under submission. The Labor Commissioner adopts the following determination of controversy.

FINDINGS OF FACT

1. Hilario Miravalles was born, lived and educated in the Philippines. In or around June of 1997, the respondent's Vice President, Thad Weinlein, flew to the Philippines in an effort to locate experienced animated artists[2]. Respondent would lure

[2] The petitioner's expertise as an animated artist includes working on background and character design for animated motion pictures, (i.e. "The Rugrats Movie").

artists back to the United States with promises of higher pay.

2. Respondent did not own an animation production company himself but rather acted as a broker of artists. Respondent would attempt to find an animation production company in need of artists and then subcontract his workers out to a third-party production company. Irrespective of the compensation negotiated with the production company, the artist would receive a first-year $40,000.00 salary, pro-rated based upon the duration of employment respondent was able to obtain. In other words, the artist was "on-call" and would be paid only for time actually worked.

3. Petitioner, a college graduate with extensive experience in background layout animation successfully passed respondents aptitude tests and was offered a job in the United States, including travel expenses. On June 30, 1997, the parties entered into a written agreement titled, "Employment Agreement." The terms of the agreement provided for an initial three (3) years, with a first year salary of $40,000.00, coupled with two (2), two (2) year options. Respondent secured an H-1B Visa[3] for the petitioner who was then transported to the United States to begin work.

4. In September of 1997 through early May 1998, respondent began work with Klasky Csupo, Inc., for the production

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[3] Sect 214(g) of the Immigration and Nationality Act provides that an H-1B Visa is required of an alien who will be employed in a specialty occupation of distinguished merit that requires theoretical and practical application of a body of specialized knowledge and attainment of a bachelor's or higher degree in the specific specialty. This is a minimum for entry into the United States.

of the "The Rugrats Movie." After "The Rugrats Movie" was completed, petitioner was laid off. Petitioner was next assigned to work at Baer Animation which lasted approximately three weeks and ended on May 31, 1998. During the next four months, respondent unsuccessfully attempted to locate work for the petitioner.

5. In October of 1998, after four months of unemployment, petitioner began to look for work himself. Petitioner interviewed with Rough Draft Studios and was promptly hired in October of 1998 with an annual salary of $62,400.00 based on a similar pro-rated formula. Miravalles enjoyed uninterrupted employment for the next several months.

6. In or around mid December 1998, Rough Draft Studios Senior Vice President, Claudia Katz, received a phone call from Thad Weinlein. Weinlein explained that he was petitioner's "agent" and as his "agent" he would require reimbursement for petitioner's travel expenses and 20% of petitioner's earnings. Weinlein later reconsidered his request and stated he would forego the 20% and travel expenses if Katz would agree to hire respondent's other workers under contract. Katz agreed to consider the proposition. Weinlein then instructed Katz to sign a "Personnel Service Agreement" which provided the terms and conditions governing the relationship between Rough Draft Studios, and Artist's Inc.. Notably, provision (A) states, "**Employer (Artists, Inc.) is in the business of providing the services of Personnel for theatrical, television and commercial productions.**" Katz explained to Weinlein that she would prefer to have her attorney look over the agreement prior to signing. Weinlein's attorney called Katz and barked that

he would have the petitioner deported immediately if Katz did not sign the agreement that day. Katz, who found petitioner to be a valuable worker, sought to avoid his deportation and reluctantly signed the agreement after striking a provision she found offensive.

7. Under the terms of the agreement between Artist, Inc. and Rough Draft, the payroll and workers' compensation responsibility would be transferred back to Artists Inc.. Petitioner continued to be compensated at $1200.00 per week, although the payroll was now being conducted by Artist, Inc.'s payroll service.

8. Over the next several months, Weinlein would call Katz and inquire whether Rough Draft Studios had hired more of Weinlein's workers without his knowledge. Sometime in the early summer of 1999, it was discovered that Katz had unknowingly hired two additional employees under contract to Weinlein. Weinlein again requested a 20% fee for each worker. Weinlein and his attorney threatened a civil lawsuit seeking compensatory damages and immediate deportation of the workers if Katz refused. Katz, unwilling to bear the expense of litigation, paid Weinlein 20% of the worker's wages. To the credit of Rough Draft Studios and Katz, the workers' earnings were unaffected as Rough Draft paid Weinlein 20% over and above the worker's current salary. This payment arrangement continued from August 1999 through September 1999. In September of 1999, on advice from counsel, Katz terminated payment to Artists, Inc.. This Petition to Determine Controversy was filed on September 3, 1999.

CONCLUSIONS OF LAW

1. The Labor Commissioner has jurisdiction to hear and determine controversies, arising between an artist and an agent, pursuant to Labor Code section 1700.44(a).

2. Labor Code §1700.4(b) defines "artists"

> "'Artists' means actors and actresses rendering services on the legitimate stage in the production of motion pictures, radio artists, musical artists . . . and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises."

The parties stipulated that petitioner is an artist within the meaning of Labor Code §1700.4(b).

3. The sole issue in this matter is whether the respondent acted as a "talent agent" within the meaning of Labor Code §1700.4(a); or alternatively as an "employer", who is not subject to the Act[4].

4. Labor Code §1700.40(a) defines "talent agency" as: "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists."

5. The respondent does not dispute petitioner's status as an artist and likewise does not contend that employment was obtained. Instead, the respondent focuses his defense on the fact

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[4] The "Act" refers to the "Talent Agencies Act", Labor Code §§1700 through 1700.47 et. seq., regulating talent agencies and creating protection for those artists seeking employment.

that, "[t]his dispute involves an artist-*employer* relationship ... [and] [a]n employer does not 'procure employment' for its own employees within the meaning of the Act and therefore cannot be a talent agent." Respondent argues that if he acted as an employer, it would be impossible for him to simultaneously act as agent. And if he is not an agent, he could not be subject to the Labor Commissioner's jurisdiction. Respondent cites *Kern v. Entertainment Direct, Case No. TAC 25-96* in support of his theory. *Kern* is distinguishable and therefore does not lend support to respondent's conclusion.

6. The respondent in *Kern* provided clowns and magicians to parties and corporate events. The amounts charged to customers were predetermined, as all rates were published in their advertisements. The engagements for the artists in *Kern* were typically for parties, limited to a one-time show, costing approximately $150.00 per performance. The hearing officer in *Kern* held, "respondents' business did not involve the representation of artists **vis-a-vis third party employers** or the negotiation of artists' compensation [and] . . . By operating its business in this fashion, respondents became the direct employer of the performers, rather than the performers' talent agency." *Kern supra. pg.* 7.

7. *Kern* is distinguishable in several respects. In *Kern*, unlike petitioner's employment, the engagements were for a very limited time, usually a few hours. Here, the jobs lasted as long as the work was available. In fact, Rough Draft offered employment that spanned over a three year period and these extended

employment opportunities were exactly the type of employment respondent sought for his artists. The length of employment between the third-party production company and the artist lends strength to the argument that the production party is the actual employer and not the respondent.

8. Moreover, in *Kern*, the hearing officer held that the recipients seeking entertainment were not employers but rather customers and held further that if a customer did not pay the artist for his performance, then the employer/respondent would be ultimately liable for the payment of the artist's wages. The employer would then be forced to seek his compensatory damages for breach of contract against the customer in small claims court. What *Kern* states ostensibly, is that the "economic reality" places the true employer in the position of providing economic viability for the artist and that is where *Kern* deviates from our case.

9. In assessing who is ultimately responsible for the payment of wages, or in other words, which party is the petitioner economically dependent on, the terms of the written agreement between Rough Draft and respondent are telling.

> Section (7) of the "Personnel Services Agreement" entered into between Rough Draft and respondent states, "PRODUCER(Rough Draft) acknowledges and agrees that understanding of and compliance with all applicable state and/or federal wage and hour laws [are] the responsibility of the PRODUCER." Section (8) states, "PRODUCER shall pay EMPLOYER (respondent) . . . all gross wages, allowances, fringe benefits, and other

payments as may be required by applicable law."

10. These provisions imply that the legal responsibility to follow all relevant laws relating to the payment of wages fall squarely on Rough Draft. Rough Draft is therefore required to provide accurate accounting of hours worked, overtime, provide the legally applicable break and lunch periods and turn those accurate figures over to respondent's payroll service for final calculation. Also, the "Service Schedule[5]," provides that **payroll is issued on check exchange only**. This provision requires respondent to verify Rough Draft's payment to respondent prior to issuing the employees' payroll (emphasis added). The reality of the arrangement is significant because it places Rough Draft as the party ultimately responsible for the payment of wages and consequently is another important factor in creating an employer-employee relationship between petitioner and Rough Draft. Conversely, a "talent agent" is not responsible for reimbursing his artist should the production company refuse to tender payment. Here, by the express terms of respondent's agreement with Rough Draft, respondent would **not be responsible for issuing payroll** if Rough Draft failed or refused to first exchange checks with the respondent.

11. Additionally, Industrial Welfare Commission (IWC) Order No. 12-80 sec. 2(f), regulating the wages, hours and working conditions in the motion picture industry, defines "employer" as "any person, . . . who directly or indirectly, or through an agent or any other person, employs or exercises control over wages,

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[5] The "Service Schedule" is a one page attachment to the "Personnel Services Agreement", establishing, *inter alia*, the time and amount Rough Draft was to pay Artist's Inc..

hours, or working conditions of any person. In our case, Rough Draft sets the hours of employment, breaks, meal periods and controls every aspect of petitioner's day to day activities.

12. In looking at the entertainment industry as a whole, it is without exception the creator of the entertainment product is the employer[6]. Whether film, television, stage, commercials or print modeling the production company is invariably the employer. Rough Draft creates the product and Rough Draft is consequently the petitioner's employer.

13. Respondent contends that contrary to an artist-agency relationship, he did not negotiate an employment deal providing the most lucrative terms for the artist and conversely negotiated the terms with prospective employers for his own primary benefit. Again, *Kern* is distinguished as the employer did not negotiate with third parties. Here, respondent was free to negotiate any compensation terms he chose, consequently this circular argument further establishes respondent's breach of his fiduciary duty toward the artist.

14. Now that it is established that the respondent acted as a "talent agent" within the meaning of the Act, we must now determine whether he "procured employment" for the artist. The term "procure", as used in this statute, means to get possession of: obtain, acquire, to cause to happen or be done: bring about." *Wachs v. Curry (1993) 13 Cal.App.4th 616, 628.* Thus "procuring employment" under the statute includes entering into discussions

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[6] "Independent Contractor" status of the employee was not discussed and is not relevant to this proceeding.

regarding contractual terms with prospective employers that leads to employment. In *Waisbren v. Peppercorn Production, Inc* (1995) 41 Cal.App.4th 246, the court held that any single act of procuring employment subjects the agent to the Talent Agencies Act's licensing requirements. Applying *Waisbren*, it is clear respondent "procured employment" within the meaning of Labor Code §1700.4(a). In fact, respondent's sole responsibility was to "procure employment" for artists in the entertainment industry as reflected by respondent's efforts with Klasky Csupo, Inc. and Baer Animation and the express terms of Provision (A) of the "Personal Services Agreement" between Rough Draft and Artists Inc. Respondent's activities fall squarely within the meaning of "procure" and he is therefore subject to the jurisdiction of the Labor Commissioner.

15. Labor Code §1700.5 provides that "no person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner." It was stipulated that the respondent has never been a licensed talent agent.

16. Since the clear object of the Act is to prevent improper persons from becoming [talent agents] and to regulate such activity for the protection of the public, a contract between and an unlicensed agent and an artist is void." *Buchwald v. Superior Court supra.; Waisbren v. Peppercorn* supra, at 261. Under *Civil Code section 1667*, contracts that are contrary to express statutes or public policy as set forth in statutes are illegal contracts and the illegality voids the entire contract. The evidence does not

leave a doubt that respondent procured employment for his artist without possessing a talent agency license. Therefore, the "Employment Agreement" between the parties must fall.

17. Respondent also contends that the express terms of the agreement create an employer-employee relationship. In *Buchwald v. Superior Court, supra.* at 347, the court rejected the argument that contractual language established, as a matter of law, the relationship between the parties. The court stated, "the Labor Commissioner is free to search out illegality lying behind the form in which a transaction has been cast for the purpose of concealing such illegality. [citation omitted.] The court will look through provisions, valid on their face, and with the aid of parol evidence, determine that the contract is actually illegal or part of an illegal transaction." As discussed, the facts establish respondent's role as an agent - not an employer - and he is therefore in violation of Labor Code §1700.5.

ORDER

1. For the above-stated reasons, IT IS HEREBY ORDERED that the "Employment Agreement" between petitioner, HILARIO MIRAVALLES and ARTISTS, INC., operated by Vice President, Thad Weinlein, is void *ab initio*. The respondent has no further enforceable rights under this contract.

2. Having not made a showing that respondent collected profits within the one-year statute of limitations found at Labor Code §1700.44(c), the petitioner is not entitled to a recoupment of profits.

3. The petitioner has obtained a new H-1B Visa through

Rough Draft Inc. and is therefor not in danger of deportation.

IT IS SO ORDERED

Dated: 10/11/00

DAVID L. GURLEY
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: OCT 11 2000

THOMAS GROGAN
Assistant Chief
to the Labor Commissioner

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS - DIVISION OF LABOR STANDARDS ENFORCEMENT

CERTIFICATION OF SERVICE BY MAIL
(C.C.P. §1013a)

HILARIO MIRAVALLES vs. ARTISTS, INC.
SF033-99 TAC33-99

I, Benjamin Chang, do hereby certify that I am employed in the county of San Francisco, over 18 years of age, not a party to the within action, and that I am employed at and my business address is 455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102.

On October 11, 2000, I served the following document:

DETERMINATION OF CONTROVERSY

by facsimile and by placing a true copy thereof in envelope(s) addressed as follows:

ALAN M. BRUNSWICK
ANDREW L. SATENBERG
MANATT, PHELPS & PHILLIPS, LLP
11355 WEST OLYMPIC BLVD.
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and then sealing the envelope with postage thereon fully prepaid, depositing it in the United States mail in the city and county of San Francisco by ordinary first-class mail.

I certify under penalty of perjury that the foregoing is true and correct. Executed on October 11, 2000, at San Francisco, California.

BENJAMIN CHANG